Filed 6/25/19 P. v. Klein CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH KLEIN,

Defendant and Appellant.

F077903

(Super. Ct. No. F18900428)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Don Penner, Judge.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Barton Bowers, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Poochigian, J. and Peña, J.

INTRODUCTION

Appellant Michael Joseph Klein's sole contention on appeal is that his case should be remanded in order to hold an eligibility hearing pursuant to recently enacted legislation set forth in Penal Code[1] section 1001.36. Klein was charged and entered a plea of no contest pursuant to a plea agreement prior to the effective date of section 1001.36. He was sentenced after the effective date.

Our recent opinion in *People v. Craine* (May 23, 2019, F074622) ___ Cal.App.5th ____ [2019 WL 2224863] (*Craine*) addressed this issue and held section 1001.36 does not apply to defendants whose cases had already progressed beyond the stage of trial, adjudication of guilt, and sentencing. We conclude section 1001.36 does not apply to defendants, like Klein, who have progressed beyond the stage of trial and adjudication of guilt, who have not sought to invoke section 1001.36 until they are serving their sentence, and who were adjudicated pursuant to a plea agreement.[2] Consequently, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

The probation report reflects that on December 23, 2017, around 7:50 p.m., the victim was driving her vehicle when she observed Klein in the center median waving his arms. As she passed Klein, she heard a loud bang on the driver's side of her vehicle. The victim pulled over to check for damage and called the police.

Officers arrived, observed the damage to the victim's vehicle, and made contact with Klein. Klein stated he was throwing rocks because he wanted someone to contact the police; someone was trying to kill him; and he needed help. He told the police he wanted to kill himself and had a history of suicide attempts.

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1 References to code sections are to the Penal Code unless otherwise specified.

2 This case has a somewhat different factual scenario than *Craine.*

Klein was transported to the hospital for a possible Welfare and Institutions Code section 5150 hold. On December 24, 2017, Klein was medically cleared. He was transported to jail and booked.

Klein was charged on January 17, 2018, with felony vandalism in violation of section 594, subdivision (a). The complaint further alleged that Klein had two prior strike convictions, served two prior prison terms, and was ineligible to be sentenced to a term in county jail because he was required to register as a sex offender. Klein pled not guilty and denied all the allegations.

Klein signed a felony advisement, waiver of rights, and plea form on June 5, 2018. In exchange for a plea of no contest to the felony vandalism count and admitting to having to register as a sex offender and one prior strike offense, there would be a 32-month lid on the term of imprisonment. The trial court accepted the no contest plea pursuant to the plea agreement on June 5, 2018.

Klein was sentenced on July 20, 2018, in accordance with the plea agreement. Klein filed a timely notice of appeal on August 6, 2018; he did not seek or obtain a certificate of probable cause.

DISCUSSION

Section 1001.36 was enacted after Klein entered a no contest plea pursuant to a plea agreement, but before Klein was sentenced. This case, therefore, presents a somewhat different factual scenario than *Craine*, where we held "section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing. We express no opinion on questions of retroactivity under other circumstances." (*Craine*, *supra*, __ Cal.App.5th __ [p. 25].)

Section 1001.36 authorizes, in lieu of criminal prosecution, the placement of certain alleged offenders into mental health treatment programs. The statute expressly contemplates a "pretrial diversion" procedure (*id*., subd. (a)), but Klein contends he is

still a "potential candidate for diversion" because the law applies retroactively. The issue of retroactivity is currently under review by the Supreme Court. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220.)

In *Craine,* we concluded the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants, like Klein, who have already been found guilty of the crimes for which they were charged. The statute potentially mitigates punishment for a specific class of persons, i.e., mentally disordered alleged offenders whose charges have not yet been adjudicated (*id*., subds. (a), (c)), and Klein is not a member of this class. The primary legislative goal of diverting mentally ill defendants from the criminal justice system through preadjudicative intervention programs cannot be achieved once the defendant has been adjudged guilty.

"Secondary goals of judicial economy and fiscal savings would actually be thwarted by attempting to apply the statute to defendants who have begun serving their sentences. In many instances, such individuals will have been released from confinement by the time their cases are remanded to determine their fitness for any supposed diversionary relief. Furthermore, although section 1001.36 provides for the dismissal of charges and expungement of a defendant's record of arrest, there is no mention of similar relief for a record of conviction." (*Craine, supra,* ___ Cal.App.5th ___ [p. 5].)

As we discuss, Klein was competent to stand trial, the record does not contain evidence of a diagnosed mental disorder, and the effective date of section 1001.36 was after Klein had been adjudicated guilty. Furthermore, he pled to the offense and admitted enhancements pursuant to a plea agreement and did not seek or obtain a certificate of probable cause.

Provisions of Section 1001.36

Section 1001.36 created a diversion program for defendants who suffer from medically recognized mental disorders, "including, but not limited to, bipolar disorder,

schizophrenia, schizoaffective disorder, or post-traumatic stress disorder …." (§ 1001.36, subd. (b)(1)(A).) "Enacted as part of Assembly Bill No. 1810 (2017–2018 Reg. Sess.) (Assembly Bill 1810), which was a budget trailer bill, the law took effect on June 27, 2018. (Stats. 2018, ch. 34, §§ 24, 37). Three months later, the statute was amended to prohibit its use in cases involving murder, voluntary manslaughter, rape and other sex crimes, the use of a weapon of mass destruction, and any offense 'for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314[, i.e., indecent exposure].' (§ 1001.36, subd. (b)(2)(A)–(H); Stats. 2018, ch. 1005, § 1.)" (*Craine, supra*, ___ Cal.App.5th ___ [p. 6].)

Subject to numerous caveats and restrictions, trial courts may now "grant pretrial diversion" when a mentally disordered individual is charged with a misdemeanor or felony offense (other than those previously mentioned). (§ 1001.36, subd. (a).) The defendant must first produce evidence of a mental disorder, which requires "a recent diagnosis by a qualified mental health expert." (*Id.*, subd. (b)(1)(A).) Among other requirements, the trial court must be "satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense," and a mental health expert must also conclude "the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment." (*Id.*, subd. (b)(1)(B), (C).)

The purpose of the new law "is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (§ 1001.35.)

As we noted in *Craine*, "diversion is generally understood to mean 'the suspension of criminal proceedings for a prescribed period of time with certain conditions.' (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) Jan. 9, 2018, p. 6; see *People v. Ormiston* (2003) 105 Cal.App.4th 676, 690 [describing the legal effect of diversion in drug cases (§ 1000 et seq.)].) However, when the Legislature uses the phrase 'pretrial diversion' in a statute, the term is often precisely defined. (See, e.g., §§ 1001.1, 1001.70, subd. (b), 1001.80, subd. (k)(1).) As used in section 1001.36, pretrial diversion means 'the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment, subject to [additional restrictions.]' (*Id*., subd. (c).) If a defendant meets the eligibility requirements of section 1001.36, the trial court may order pretrial diversion into an approved treatment program for a maximum period of two years. (*Id*., subd. (c)(1), (3)" (*Craine*, *supra*, __ Cal.App.5th __ [pp. 7–8].)

The legislative history for section 1001.36 provides: "Prior to the enactment of Assembly Bill 1810, the Legislature envisioned a 'mental health diversion program with a focus on reducing the number of Incompetent to Stand [Trial] referrals to the Department of State Hospitals.' (Assem. Floor, Bill Analysis of Assembly Bill 1810 as amended June 12, 2018 (June 18, 2018, item 17, p. 7).)" (*Craine*, *supra*, ___ Cal.App.5th ___ [p. 22].)

Section 1001.36 Does Not Apply to Klein

There are multiple criteria that must be satisfied before a defendant comes within section 1001.36. Here, the record contains no evidence of a recent diagnosis by a mental health expert that Klein suffered from any mental health concern that would benefit from treatment. (§ 1001.36, subd. (b)(1)(A).) Klein was released from the hospital after being assessed pursuant to Welfare and Institutions Code section 5150. Presumably the

assessment disclosed no mental health concerns, or Klein would not have been released. Thus, a pretrial diversion program to avoid a referral to a state hospital as incompetent to stand trial would have served no purpose.

Klein also was past the point of adjudication when section 1001.36 went into effect. He pled to the offense and admitted the enhancements on June 5, 2018; the statute went into effect three weeks later, on June 27, 2018. Klein was sentenced the following month, on July 20, 2018. Klein did not seek to withdraw his plea and invoke section 1001.36 at sentencing; he did not seek to invoke section 1001.36 until after he was serving his sentence.

As discussed, " 'pretrial diversion' means the *postponement of prosecution*, either temporarily or permanently, at any point in the judicial process *from the point at which the accused is charged until adjudication* …." (§ 1001.36, subd. (c), italics added.) We stated in *Craine* that "adjudication," which is an undefined term, is shorthand for the adjudication of guilt or acquittal. (*Craine*, *supra*, ___ Cal.App.5th ___ [p. 14]; see *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [statutory language is given its "plain and commonsense meaning … in the context of the statutory framework as a whole"]; see also *In re Harris* (1989) 49 Cal.3d 131, 135 ["[T]here is 'no distinction between an adjudication of guilt based on a plea of guilt and that predicated on a trial on the merits.' "]; Black's Law Dict. (10th ed. 2014) p. 50, col. 1 [defining "adjudication"].)

We also stated in our opinion in *Craine*, "First, '[t]he purpose of those programs is precisely to *avoid* the necessity of a trial.' (*Gresher v. Anderson* (2005) 127 Cal.App.4th 88, 111.) Second, the canons of statutory interpretation require scrutiny of the relevant text, 'giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.' (*Dyna-Med, Inc. v. Fair*

Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386–1387.)" (*Craine, supra*, __ Cal.App.5th ___ [p. 16].)

"Section 1001.36 does offer the possibility of avoiding a criminal record, but the Legislature used preadjudicative language to describe these benefits. If a defendant successfully completes the diversion program, the trial court 'shall dismiss the defendant's criminal *charges* that were the subject of the criminal proceedings at the time of the initial diversion.' (*Id*., subd. (e), italics added.) The remaining benefit is what we have referred to as expungement: '[I]f the court dismisses the charges, the *arrest* upon which the diversion was based shall be deemed never to have occurred, and the court shall order access to the *record of the arrest* restricted in accordance with Section 1001.9 [the expungement provisions of a separate misdemeanor diversion program], except as specified in subdivisions (g) and (h) [setting forth additional limitations].' (*Ibid*., italics added.)" (*Craine, supra*, __ Cal.App.5th ___ [pp. 19–20].)

In conclusion, the legislative intent behind section 1001.36 is clear from the text of the statute and confirmed by the legislative history. "It would be impertinent for this court to place a strained interpretation upon [the] statute merely to bring about a result which, in the enactment of that statute, was neither contemplated nor intended." (*People v. Borja* (1980) 110 Cal.App.3d 378, 382.)

Effect of Plea Agreement

Assuming for the sake of argument that section 1001.36 applied to Klein, there is no indication in the record that he moved to set aside his plea, after its entry and prior to sentencing, in order to avail himself of the benefits of section 1001.36.

Sentencing was initially set for July 3, 2018, but was continued for Klein to confer with counsel. At the continued sentencing hearing on July 6, 2018, Klein waived time for sentencing and the matter was continued. At the July 20, 2018 continued sentencing

hearing, Klein raised no objection to proceeding with sentencing, did not seek to withdraw his plea, and did not invoke section 1001.36.

Furthermore, Klein entered into a plea agreement which resulted in dismissal of certain allegations and a stipulated lid at sentencing of 32 months. He was sentenced in accordance with the agreement. His failure to request a certificate of probable cause limited review to issues concerning the jurisdiction of the court or the legality of the proceedings. (§ 1237.5; *In re Chavez* (2003) 30 Cal.4th 643, 649.) No such issues were raised.

DISPOSITION

The judgment is affirmed.